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July 31, 2006

Nancy M. Morris  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-1090

Re: **Proposed Distribution Plan for Pilgrim Baxter  
& Associates, Ltd. (Administrative Proceeding -- File Number 3-11524)**

Dear Ms. Morris:

The SPARK Institute, Inc. ("SPARK")<sup>1</sup> appreciates this opportunity to comment regarding the proposed distribution plan for Pilgrim Baxter & Associates, Ltd. ("Pilgrim Baxter") that was published by the U.S. Securities and Exchange Commission ("SEC") on June 30, 2006 (the "Distribution Plan"). The SPARK Institute members include the retirement plan record keepers that will be responsible for gathering and providing accountholder information, making certain allocations, receiving distributions, and making distributions to plan participants who are the intended beneficiaries of a substantial portion of the distribution at issue.

We commend the SEC for its prior efforts to address and minimize the administrative complexities associated with allocating and distributing payments to retirement plans. However, The SPARK Institute is concerned about certain aspects of the Distribution Plan. Moreover, we are concerned

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<sup>1</sup> SPARK represents the interests of a broad based cross section of retirement plan service providers, including members that are banks, mutual fund companies, insurance companies, third party administrators and benefits consultants. SPARK members include most of the largest service providers in the retirement plan industry and the combined membership services more than 90% of all defined contribution plan participants.

that the Distribution Plan has already or will set precedent for the other distribution plans that are pending with the SEC. Our concerns are summarized below.

**I. The Distribution Plan Should Expressly Provide That The Fund Administrator Will Either Determine The Participant Level Allocations For Retirement Plan Omnibus Accounts Or Reimburse The Plan Record Keeper For Undertaking Such Task.**

It is our understanding that the procedures under Section 8.6.2 relating to “Holders in Omnibus Accounts” will apply to the identification and distribution calculation for retirement plan accounts. According to the Distribution Plan, the Fund Administrator will engage in an “Outreach Process,” contacting certain “Omnibus Account Brokerage Firms” and requesting individual account holder information (Section 8.6.2.4).<sup>2</sup> The Fund Administrator will use such information to determine the amount due to the accounts that are directly underlying the Omnibus Account, i.e., the “Tier 1” account ( Section 8.6.2.6). We note that with respect to retirement plan omnibus accounts the Tier 1 account can be either an individual plan participant or a plan level omnibus account. The Distribution Plan also provides that to the extent that the account holder identification information provided to the Fund Administrator in turn identifies Omnibus Accounts, the Fund Administrator will treat the accountholder as a Tier 1 purchaser and determine the allocation according to the provisions referenced above (Section 8.6.4.1). Presumably, according to such provisions, if a retirement plan is the Tier 1 account holder, it will be considered an “Embedded Omnibus Account” under Section 8.6.4 of the Distribution Plan.

It appears that the Distribution Plan does not provide for the Fund Administrator to determine the underlying individual plan participant allocations when the Embedded Omnibus Account is a retirement plan, even if the plan record keeper is willing and able to provide the necessary transaction information. The Department of Labor (“DOL”) provided guidance regarding these matters in Field Assistance Bulletin (“FAB”) 2006-1, dated April 19, 2006. Under the FAB, the DOL concluded that a retirement plan service provider becomes a fiduciary upon receipt of settlement funds, even if such entity is not otherwise a fiduciary with respect to the plan it services. The guidance provides a safe harbor for retirement plan service providers if the service provider utilizes the particular allocation methodology set forth in a distribution plan. Because of the complexity of the allocation methodology under the Distribution Plan and the fact that the Plan Administrator will not make individual participant level allocations, the Distribution Plan effectively eliminates any possibility for a retirement plan service provider to rely on the safe harbor provisions in the FAB. A retirement plan record keeper that is not otherwise a plan fiduciary, and is unwilling to assume such role, has no choice but to replicate the calculations under the Distribution Plan or accept a fiduciary role and the potential liability, which is not contemplated in their arrangement with the plan they service. It is unreasonable to expect a retirement plan record keeper to apply the specific allocation methodology in the Distribution Plan across thousands of participants in order to avoid unexpected fiduciary status. Additionally, such record keepers may not have the expertise or staff necessary to make such allocations.

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<sup>2</sup> We have assumed that the term “Omnibus Account Brokerage Firm” as used in the Distribution Plan is intended to include retirement plan service providers (including record keepers) who are technically not brokerage firms. In the event that such assumption is incorrect, The SPARK Institute requests that the Distribution Plan be modified and additional time for comment provided as needed to the extent that treatment of retirement plan service providers will be different than we have assumed.

Accordingly, The SPARK Institute requests that the Distribution Plan be modified to provide that the Fund Administrator will either determine the participant level allocations for Embedded Omnibus Accounts that are retirement plans or reimburse the plan record keeper for undertaking such task. Our position regarding expense reimbursement is discussed in detail under Section IV.

## **II. The Time Allowed For The Outreach Process With Respect To Retirement Plan Accounts Should Be Extended In Order To Avoid Undue Hardship On Retirement Plan Record Keepers.**

The Distribution Plan provides that the Outreach Process will end after 60 days from the approval of the Distribution Plan, unless Dr. Lehn decides otherwise (Section 8.6.2.7). The SPARK Institute is concerned that 60 days is inadequate for retirement plan record keepers to provide the requested information. Such information spans 3 ½ years beginning in 1998. Retirement plan record keeping systems have changed significantly since 1998. Many service providers have changed record keeping platforms, have outsourced their record keeping operations to other entities, or have been involved in mergers and acquisitions. Some of the information may be on systems that are no longer supported by the service provider or its software vendor. Additionally, most retirement plan record keeping systems do not retain historical transaction information in the way a typical brokerage system retains such information.<sup>3</sup> Simply stated, although the transaction information can be retrieved, the data gathering process is extremely complicated and will require the dedication of significant information technology (“IT”) resources. Each record keeper will, among other things, likely have to dedicate IT resources to develop programs or applications to extract the required data from among millions of historical records and then review the output for quality control purposes. Some of our members have advised us that they may have to hire additional IT staff to meet the demands of all of the impending distributions plans. Additionally, our members are concerned that they are already devoting significant IT resources towards making system changes to facilitate mutual fund industry compliance with SEC Rule 22c-2. Absent an extension from the SEC, Rule 22c-2 has a compliance deadline of October 16, 2006. The combined demands that these matters will impose in the future on retirement plan service providers is significant and should not be overlooked when considering the time needed by them to respond to the information requests from even one fund administrator, let alone many.

We also note that retirement plan record keepers do not generally act in a fiduciary capacity with respect to the plans they service, and may not have the authority to do so. Additionally, such record keepers may elect to handle this matter according to the provisions in the DOL FAB that suggests that a record keeper “may be able to avoid fiduciary status” if the “receipt, allocation

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<sup>3</sup> For example, many retirement record keeping systems maintain participant holdings in “units” of ownership rather than the actual fund shares. Generally one unit does not equate to one share of the fund. Consequently, the information gathering process will require the plan record keeper to develop a process or program to convert the unit information into share information. Also, retirement plan record keeping systems frequently do not maintain daily account balances but only daily transactions and month-end account balances. To provide the requested daily balances, service providers must re-calculate these. These will be time consuming and potentially costly efforts.

and/or distribution services . . . are carried out in accordance with the directions and approval of appropriate plan fiduciaries. . . .” (FAB 2006-1.) Obtaining such directions and approval is a time consuming process.

The Distribution Plan allows Dr. Lehn significant discretion in determining the amount of time that the Omnibus Account Brokerage Firms will have to provide the requested data. The SPARK Institute urges the SEC and Dr. Lehn to allow retirement plan record keepers the time that is reasonably necessary to gather and provide the required data. We recommend that the Distribution Plan require that record keepers acknowledge the notification from the Fund Administrator by providing a contact at the record keeper who will work with the Fund Administrator. Such contact will be responsible for working with the Fund Administrator to understand the details of the distribution process and information request, and then develop a reasonable plan and timetable. The Distribution Plan should allow a minimum of 30 days for the record keeper to provide the requested acknowledgement.

### **III. The Transaction Data Required With Respect To Retirement Plan Omnibus Accounts Should Be Modified.**

Payments under the Distribution Plan are based on the shares held by each account holder on each day over a 3 ½ year period (Sections 6.5.1, 7.2, and 8.6.2.4). Although this may be a precise method of determining the amount owed to accountholders, the effort and cost associated with gathering this information with respect to retirement plans, even at the plan level, is not administratively cost effective and may not be justifiable given the ultimate benefit of such accuracy (see footnote 2). As discussed more fully below under Section IV, the costs associated with determining such amounts that are not reimbursed by Pilgrim Baxter will likely be borne by plan participants.

In order to address this concern, The SPARK Institute urges the SEC to modify the Distribution Plan with respect to retirement plan accountholders to allow for month-end balances to be used for calculating payouts to the extent that it is more cost effective and will not knowingly result in a material disadvantage to accountholders.

### **IV. The Distribution Plan Should Expressly Provide For Reimbursement Of Expenses To Retirement Plan Intermediaries For Providing Requested Information, And Making Allocations And Distributions.**

The Distribution Plan expressly provides that Pilgrim Baxter will bear the administrative costs incurred by Omnibus Holder Brokerage Firms for identifying individual account holders in connection with the Distribution Plan (Section 8.7). However, the Distribution Plan includes certain conditions and limitations that unduly shift significant financial risks and burdens from Pilgrim Baxter to retirement plan service providers. Such financial burdens will very likely be ultimately borne by the individual plan participants who are the intended beneficiaries.

Section 8.7 of the Distribution Plan limits the amount of reimbursements to the “extent that such costs are commercially reasonable in light of the amount to be distributed to such firms.” The costs for retirement plan record keepers will be dictated by the level and extent of the data required to make the allocation under the Distribution Plan. Such costs are not impacted by the

amount of the ultimate payments. Moreover, retirement plan record keepers must gather and provide the required data, and will incur significant costs and expenses prior to knowing whether and to what extent they will be reimbursed. Further, the Distribution Plan provides that a record keeper that does not provide the information required under the Distribution Plan must make the distributions at its own cost (Section 8.6.2.7). This puts retirement plan record keepers in an unacceptable position of having to choose between (1) providing the data and incurring significant costs with no guarantee of reimbursement, or (2) refusing to provide the data and making the distribution at its own expense. In either case the retirement plan record keeper is forced to choose between two unacceptable options. The costs associated with allocating and making distributions that are not reimbursed by Pilgrim Baxter will likely be passed on to plan participants and reduce, if not entirely eliminate, their distribution amount.

The SPARK Institute recommends that if the Fund Administrator can reasonably estimate the gross payment amount to an Omnibus Holder Brokerage Firm at the time it makes an information request, the Fund Administrator should also provide an estimate of the potential cost reimbursement to such Omnibus Holder Brokerage Firm. This will allow the plan record keeper and the Fund Administrator to determine what is the most cost effective way to handle the matter. However, regardless of the approach taken, Pilgrim Baxter should remain responsible for the administrative costs incurred by Omnibus Holder Brokerage Firms.

**V. The Distribution Plan Should Be Modified To Require Any Entity That Receives Confidential Information Provided By An Omnibus Holder Brokerage Firm To Acknowledge and Maintain Its Confidentiality.**

The Distribution Plan provides that the Fund Administrator will use commercially reasonable efforts to protect the privacy and confidentiality of the data, including accountholder data, in any and all communications with “PBA,” by using unique account identifiers (Section 8.6.2.5). Such provision appears to only apply to communications between the Fund Administrator and PBA. Our members are concerned that the confidentiality provision as written is not broad enough, especially if the data provided to the Fund Administrator includes participant-level data. Accordingly, we request that the Distribution Plan be modified to require any entity that receives confidential information provided by an Omnibus Holder Brokerage Firm acknowledge the confidential nature of the data, and agrees in writing to keep the data confidential.<sup>4</sup>

**VI. The Determination Letter Requested From The Internal Revenue Service By The Tax Administrator Should Address Certain Issues Specific To Retirement Plans.**

The SPARK Institute requests that the guidance provided by the Internal Revenue Service address certain tax reporting requirements with respect to retirement plan distributions.

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<sup>4</sup> Some of our members have informed us that they are required to obtain such assurances prior to providing such data to a third party as a matter of law or pursuant to their customer agreements.

Specifically, where the Fund Administrator makes a payment directly to an individual accountholder, as between the Fund Administrator and the Omnibus Holder Brokerage Firms, who is responsible to provide any tax reporting that may be required?

**Conclusion**

We would be remiss for not pointing out that some of our members are extremely concerned about the fact that they are being required to play a significant role in this process which is the result of mutual fund scandals with respect to which they are not at fault. Such members are being asked, if not forced, to accept fiduciary responsibilities that they never contemplated undertaking, and to incur and absorb significant costs to facilitate this Distribution Plan and others that are pending. Such members are further troubled by the fact that these distribution plans are being developed by third parties without their participation. We respectfully request that the SEC consider these concerns as they evaluate this comment and our request for modifications.

Additionally, we understand that the SEC released the Distribution Plan for Columbia Management Advisors, Inc. on July 19, 2006 (Administrative Proceedings File No. 3-11814), and is preparing to release additional plans in the coming weeks. We request that the SEC consider these comments in connection with such other distribution plans to the extent that they contain comparable provisions.

We thank you for this opportunity to comment on this very important effort. Should you have additional questions or need additional information regarding this comment, please do not hesitate to contact us at (860) 658-5058.

Respectfully,

/s/

Robert G. Wuelfing  
President

/s/

Larry H. Goldbrum  
General Counsel

cc: Peter H. Bresnan, Division of Enforcement (Securities and Exchange Commission)  
Lou Campagna, Employee Benefits Security Administration (Department of Labor)